Supreme Court, U.S.
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No. 02-529

IN THE

Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Petitioner,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. INTRODUCTION

As discussed below, the authorities and arguments presented by respondents further illustrate how the Ninth Circuit's decision is in conflict with: decisions in the other circuits regarding federal preemption and the filed rate doctrine; the clear meaning of 16 U.S.C. § 839f(e)(5); and its own decisions regarding its own jurisdiction over contract claims against BPA.

II. REPLY TO OPPOSITION FILED BY SIERRA PACIFIC POWER COMPANY

A. Aircraft Noise Cases Do Provide A Useful Analogy.

TANC has suggested that inverse condemnation cases and nuisance cases in which property owners are awarded compensation for the adverse effects of noise from aircraft illustrate that "state" causes of action may arise out of activities which are federally regulated.

The case of *Greater Westchester Homeowners Association v. Los Angeles*, (1979) 26 Cal.3d 86 cited by Sierra Pacific is a good example. Sierra Pacific argues that under the *Greater Westchester* case "the harm that could be compensated under state law resulted from locally controlled activities, not from federally approved activities as stated by TANC". SP Opposition, page 12. To the contrary, the activity giving rise to the claims in the *Greater Westchester* case was the flying of commercial aircraft – an activity fully controlled by the federal government. Further, the very aspect of that activity causing harm – noise – is specifically governed by federal regulation. The California Supreme Court noted that "the federal government exercises exclusive control over aircraft 'in flight', defined as all movement of the plane from departure to arrival gates" (*Id.* at 92); that "federal noise control standards have been in effect since 1969" (*Id.* at 95); and that this Court in *City of Burbank v. Lockheed Air Terminal*, (1973) 411 U.S. 624, had held that the Federal Aviation Act "had completely preempted local regulation of 'aircraft in flight' for the purpose of aviation noise abatement" (*Id.* at 95). Further, the City of Los Angeles,

as Sierra Pacific does here, argued federal preemption: "pointing to the depth of federal involvement in air navigation and noise abatement . . . City and its amici urge preclusion of any state recognized tort liability for airport noise". *Id.* at 99. The activity at issue in *Greater Westchester* was clearly federally regulated, not locally controlled as Sierra Pacific contends. Indeed, local control of airport noise *would* be preempted: "the noise in question originates from flying aircraft over which the United States government exercises exclusive dominion and therefore any attempted noise control by an airport operator is federally preempted". *Id.* at 93.

While the State of California may not regulate aircraft noise, it may provide for tort and other remedies for those aggrieved by it. Likewise, the State of California may not regulate the activities of the respondents to the extent those activities are regulated by FERC, but may certainly provide for the remedies which TANC seeks in this action.

B. The Ninth Circuit Did Misapply The Filed Rate Doctrine.

Sierra Pacific argues that TANC misapplies the filed rate doctrine. It is the Ninth Circuit which applied the filed rate doctrine, not TANC. TANC does not believe that the filed rate doctrine applies at all in this case.

Sierra Pacific argues that TANC mistakenly construes the FERC-approved allocation of 4800 MW to be a "filed rate". It was the Ninth Circuit, not TANC, that came up with the idea that FERC allocations or ratings are "filed rates" for purposes of the filed rate doctrine.

Sierra Pacific argues that "even if FERC had 'approved' the rating of the California-Oregon Intertie, that rating does not confer rights to use the Northwest AC Intertie". SP Opposition, page 13. TANC agrees with this statement. TANC's rights stem not from a rating, but from its Agreements with the Northwest Parties. Further, TANC makes no claim that it has a "right to use the Northwest AC Intertie". TANC claims that it has a right to expect the Northwest Parties to abide by their contractual promises to maintain 4800 MW of north to south capacity at the California-Oregon border.

C. The Doctrine of Collateral Estoppel Does Not Prohibit One Who Opposes A Project Before An Administrative Agency From Thereafter Seeking Damages After The Project Becomes Operational.

As far as TANC is aware, courts in most jurisdictions, California included, *require* a complainant to exhaust administrative remedies before resorting to the courts. Of course, TANC's position before FERC that the Alturas line should not be built, and TANC's claims in this litigation that the line, now that it has been built, has resulted in damages to TANC, are supported by the same circumstances – initially predicted, now reality. But that is the case whenever exhaustion of administrative remedies is followed by litigation.

None of the cases cited by Sierra Pacific precludes TANC's claims. None holds that a party which pursues administrative remedies with regard to a matter is thereafter precluded from litigating that same matter.

The question in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) was "whether a party who has had issues of fact adjudicated adversely to it in an equitable *action* may be collaterally estopped from relitigating the same issues before a jury and in subsequent legal action brought against it by a new party". (*Id.* at 324; emphasis added). Here, TANC has never previously litigated its claims in any *action*.

United States v. Utah Construction Co., 384 U.S. 394 (1966) involved the contract provision that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal of the head of the department whose decision shall be final and conclusive upon the parties thereto". *Id.* at 397-398. Here, there is no such contract provision, and no officer or agency has ever decided any of TANC's breach of contract or other claims.

In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), this Court citing *United States v. Utah Construction & Mining Company*, 384 U.S. 394 (1966), held that "when an administrative agency is *acting in a judicial capacity* and

resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose". (*Id.* at 797-798; emphasis added). Here, no administrative agency *acting in a judicial capacity* has ever resolved disputed issues of fact regarding any of TANC's claims in this action.

Sierra Pacific's argument is that a party who opposes a project during hearings of the administrative agency charged with approval of that project is thereafter foreclosed from litigating claims arising out of the project's adverse impacts (which the party warned would occur). As far as TANC is aware, no case has ever so held.

Sierra Pacific argues that the "factual predicate" behind TANC's claims that the Northwest Parties breached the Agreements is that the Alturas Intertie causes a reduction in capacity at the California-Oregon border – a factual issue being "resolved by FERC". First, the factual predicate of TANC's claims is that the Northwest Parties failed to maintain 4800 MW of north to south transfer capacity at the California-Oregon border. Second, FERC, all parties involved in this action, and the District Court in footnote 6 of its opinion, all concur that "when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the California-Oregon Intertie is reduced by the amount delivered to the Alturas Intertie". (Appendix B, page 31a). Reduction in capacity is not an "issue" to be decided by anyone. It is an undisputed fact.

FERC has expertise over matters such as rates, capacity allocation, access, priority, and priority rights. TANC in this litigation does not ask the Court to evaluate, set, or even address any of the aforementioned.

D. TANC Does Not Seek To Adjudicate Transmission Rights.

Sierra Pacific argues that TANC may not in this action "establish rights over the interstate transmission grid". SP Opposition, page 9. TANC does not seek to do so. It does

not seek to establish, challenge, modify or adjudicate rates, tariffs, ratings, access or transmission rights. It seeks money damages because the Northwest Parties breached their promises to maintain 4800 MW of north to south capacity at the California-Oregon border which they made in the Agreements, and it seeks money damages on account of the physical interference with its facilities caused by the operation of the Alturas Intertie Project.

III. REPLY TO OPPOSITION FILED BY BONNEVILLE POWER ADMINISTRATION ("BPA")

A. TANC Does Not Challenge BPA's Decision To Participate In The Alturas Intertie Project.

In order to justify application of 16 U.S.C. § 839f(e)(5), BPA attempts to characterize TANC's claims as a challenge to BPA's participation in the Alturas Intertie Project. BPA supports that characterization by quoting the allegation in paragraph 35 of TANC's complaint that the Northwest Parties breached the Agreements by such participation. BPA does this even though it also argues that it is the true nature of a Plaintiff's claim which is determinative, not the Plaintiff's characterization of that claim in its complaint. More importantly, if one reads this isolated allegation within the context of the other allegations in TANC's sixth cause of action (E.R. 6-8), it is clear that the essence of the breach of the Agreements is the failure to maintain 4800 MW of transfer capability. Indeed, in the sentence after the one cited by BPA, TANC explains that whenever power is transferred north to south to the Alturas Intertie Project, the capability of the Northwest Parties to export power to the California Transmission Facilities is reduced on a MW for MW basis.

Technically, the allegations cited by BPA are superfluous. BPA's interconnection to the Alturas Intertie Project is not a per se breach of the Agreements. Nowhere do the Agreements prohibit such an interconnection. Further, interconnection with the Alturas Intertie Project does not inevitably lead to a breach of the Agreements. Other measures, such as increasing the capacity of the Northwest Intertie, or taking into account the

Northwest Parties' contractual obligations to TANC when scheduling flows from the Northwest Intertie, would allow the Alturas Intertie Project to operate without impacting TANC's rights under the Agreements. Put another way, if the Northwest Parties maintain 4800 MW of transfer capability at the California-Oregon border, they are not in breach of the Agreements. If they do not, they are in breach. Neither conclusion is affected by interconnection to the Alturas Intertie Project.

BPA's decision to join the Northwest Intertie with the Alturas Intertie Project was not per se inconsistent with BPA's obligations under the Agreements. Such an interconnection is not a per se a breach of the Agreements and neither TANC, nor any other party under contract with BPA, should be required to presume that BPA will breach a contract before it actually does so. TANC should be entitled, if not required, to assume that BPA will abide by its contractual obligations absent a decision or action by BPA which expressly repudiates its contractual obligations, itself constitutes a breach, or inevitably will result in a breach.

B. Conflict Among Ninth Circuit Cases Regarding The Ninth Circuit's Jurisdiction Of Breach Of Contract Claims Against BPA Does Warrant This Court's Review.

BPA argues that "claims of an intra-circuit conflict do not ordinarily warrant this Court's review", citing *Wisniewski v. United States*, 353 U.S. 901 (1957) (BPA Opposition, page 11). *Wisniewski* did not involve a fundamental conflict between two published decisions of the Eighth Circuit. Further, the issue in *Wisniewski's* – concerning the allowable contents of a liquor bottle – could arise in any of the circuits. Here, since under 16 U.S.C. § 839f(e)(5) the Ninth Circuit has exclusive jurisdiction over suits challenging final actions and decisions of BPA, it is highly unlikely that any circuit other than the Ninth Circuit (with the possible exception of the United States Court of Federal Claims) would rule on the issue of whether a suit

against BPA presents a claim for breach of contract or a challenge to a BPA administrative action or decision.

Conflict among decisions of the Ninth Circuit creates the same uncertainty among those with claims against BPA that intercircuit conflicts create among interested parties. The uncertainty caused by the present decision among those with claims against BPA is no less significant because the present decision conflicts with another decision of the Ninth Circuit rather than with a decision of another circuit.

Further, the Ninth Circuit's decision in this case does squarely conflict with *Gulf States Utilities Co. v. Alabama Power Co., et al.*, 824 F.2d 1465 (5th Cir. 1987). Although *Gulf States* did not involve BPA, the Court in that case properly held that a claim for the breach of contracts for the purchase and sale of electricity were not preempted by the Federal Power Act even though FERC had approved the contracts at issue (*Id.* at 1471-1472), and FERC has exclusive jurisdiction over interstate power rates (*Id.* at 1468).

C. The Present Case Does Present A Quintessential Breach Of Contract Case Against BPA Unlike The Many Cases Cited By BPA.

In the cases cited by BPA, unlike in the present case, the true nature of the claim *was* a challenge to a BPA administrative decision or action. Indeed, in most of those cases the issue was not a close one.

CP National Corporation v. Jura, 876 F.2d 745 (9th Cir. 1989) involved "a petition to review rate schedules enacted by the Bonneville Power Administration" and "a challenge [of] the 'availability charge' contained in the 1983 Priority Firm Power Rate Schedule". *Id.* at 746. Thus, that case clearly involved a challenge to a *rate* enacted by BPA, and has no relevance here.

In *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843 (9th Cir. 2001), the petitioners challenged a decision by BPA regarding which *rate* to be charged petitioners for their power purchases. Not even the petitioners, who filed

petitions for review of BPA's decision under 16 U.S.C. § 839f(e)(5), believed their claim was for breach of contract. Again, a case of no relevance.

In *M-S-R Public Power Agency v. Bonneville Power Admin.*, 297 F.3d 833 (9th Cir. 2002), petitioners challenged BPA's method for calculating excess federal power – clearly a challenge governed by 16 U.S.C. § 839f(e)(5). What is interesting about this case is the court's holding that the challenge to the timeliness of BPA's notices of excess federal power does sound in contract, and for that reason the Court Of Federal Claims, not the Ninth Circuit, has jurisdiction over these claims. The court noted that "BPA's obligation to provide notice arose from the parties' Sales Agreement; neither statute nor agency regulation requires notice". *Id.* at 841. Likewise, here, BPA's obligation to maintain 4800 MW of transfer capability arises from its Agreements with TANC, not from any statute or regulation. Further, BPA prepares excess power forecasts pursuant to BPA policies and decisions which were in turn adopted "to interpret and implement its excess federal power marketing authority under 16 U.S.C. § 832m". *Id.* at 837. Without question, the challenge to the timeliness of BPA's notices mounted in *M-S-R*, which the court held *was* grounded in contract, is far "less contractual" than the challenge being made by TANC, which the same court has held is *not* grounded in contract. The conflict broadens and deepens, and should be resolved by this Court.

In *Pacific Power & Light*, 795 F.2d 810 (9th Cir. 1986), appellants sought to enforce agreements which restricted the manner in which BPA could change its methodology for determining a utility's average cost, which in turn is used by BPA to determine subsidies to investor-owned utilities. This methodology is authorized by statute, 16 U.S.C. § 839c(c)(7), is subject to review and approval by FERC, and was formally adopted by FERC. *Id.* at 812. It almost goes without saying or further analysis, that any attempt to enforce a constraint – whether by contract or otherwise – on BPA's adoption or modification of this methodology would be a challenge to rate

making by BPA and the Court so held. There is a fundamental difference between the present case and the *Pacific Power* case. In the *Pacific Power* case the agreements restricted the manner in which BPA could change the methodology for calculating average cost, a BPA ratemaking activity authorized by, indeed required by, federal statute, and subject to FERC review and approval. In the present case, the Agreements do not restrict the manner in which BPA conducts activities which it is required or authorized by law to undertake. The Agreements do not pertain to BPA's statutory authority. They do not limit or direct the exercise of that authority. They do not prohibit BPA from participating in the Alturas Project or govern how, when, or whether BPA shall participate. In the Agreements BPA did not promise not to participate in the Alturas Intertie Project or any other project. The Agreements nowhere restrict interconnection with the Alturas Intertie Project or any other system. Such interconnections do not result in breach of the Agreements. Failure to maintain 4800 MW of transfer capacity - for whatever reason – does.

In *Puget Sound Energy, Inc. v. United States*, 47 Fed. Cl. 506 (2002), plaintiff expressly challenged BPA's application of a rate schedule "established on the record in the formal rate proceeding in which Puget participated, held pursuant to the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h" and adopted in a BPA Final Record Of Decision. *Id.* at 508. Not surprisingly, the court held that plaintiff's claim was a challenge to a BPA rate schedule, and was therefore governed by 16 U.S.C. § 839f(e)(5), and that that result was not altered by the fact that the rate schedule was incorporated in an agreement between plaintiff and BPA.

D. A Party In Contract With BPA Should Be Compelled To Challenge A BPA Decision Only When That Decision Will Interfere With BPA's Existing Contractual Obligations To That Party, But Not Simply When It Might.

BPA and the Ninth Circuit believe that a party on notice that a BPA decision *might*, under certain circumstances, interfere with BPA contractual obligations to that party should be compelled to challenge that decision within 90 days of its making. No case has ever so held and 16 U.S.C. § 839f indicates otherwise. 16 U.S.C. § 839f(i)(3) provides in part that "the Administrator shall furnish services including transmission . . . unless he determines such services cannot be furnished without substantial interference with . . . existing contractual obligations". Thus, when BPA decided to interconnect with the proposed Alturas Intertie Project, BPA must have determined that it could do so without substantially interfering with its existing contractual obligations to TANC under the Agreements. TANC agrees with that determination. There were and are a number of means by which such interference can be avoided. Among those are increasing the capacity of the Northwest Intertie and/or monitoring power flows to the Alturas Intertie Project.

IV. CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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